

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL 77-7019

To be argued by
JAMES G. FOLEY

United States Court of Appeals
FOR THE SECOND CIRCUIT

PAUL G. GARRITY,

and

Plaintiff,

GARRITY INDUSTRIES, INC.,

Plaintiff-Appellant,
Cross-Appellee,

—against—

SOCIETE LES PILES WONDER,

Defendant-Appellee,
Cross-Appellant,

and

WONDER CORPORATION OF AMERICA,

Defendant.

ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

COMBINED ANSWERING BRIEF AND MAIN BRIEF ON
CROSS-APPEAL OF DEFENDANT-APPELLEE,
CROSS-APPELLANT

PENNIE & EDMONDS

330 Madison Avenue

New York, New York 10017

Attorneys for Defendant-Appellee,
Cross-Appellant, Societe Les
Piles Wonder ,

Of Counsel:

JAMES G. FOLEY

KEITH E. MULLENGER

JOSEPH J. C. RANALLI

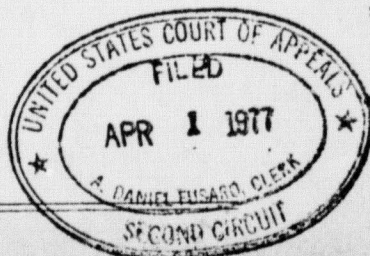


TABLE OF CONTENTS

	PAGE
Counter-Statement of the Case with Respect to the Appeal	1
Counter-Statement of the Facts with Respect to the Appeal	2
Piles Wonder's Answering Argument to Garrity Appeal	3
ARGUMENT:	
POINT I—Payment of the invoices was wrongfully withheld	3
POINT II—The District Court's exercise of discretion in awarding prejudgment interest was proper ..	9
Conclusion	12
MAIN BRIEF ON CROSS-APPEAL	
Statement of Issue Presented for Review	12
Statement of the Case	12
Statement of Facts	13
ARGUMENT:	
POINT I—The District Court erred in excluding from the jury consideration of the Mark IV replacements in mitigation of damages	13
Conclusion	17

AUTHORITIES CITED

Cases:	PAGE
<i>L. Albert & Son v. Armstrong Rubber Company</i> , 178 F.2d 182 (2d Cir. 1949)	10
<i>Apex Mining Co. v. Chicago Copper & Chemical Co.</i> , 340 F.2d 985 (8th Cir. 1965)	14
<i>Beech Aircraft Corp. v. Flexible Turburg Corp.</i> , 270 F.Supp. 548 (D. Conn. 1967)	14
<i>Bernhard v. Rochester German Insurance Co.</i> , 79 Conn. 388, 65 A. 134 (1906)	11
<i>Bertozi v. McCarthy</i> , 164 Conn. 463, 323 A.2d 553 ..	11
<i>Cecio Brothers, Inc. v. Feldman</i> , 161 Conn. 265, 287 A.2d 374 (1971)	9-10
<i>City of Detroit v. Grinnell Corporation</i> , 495 F.2d 448 (2d Cir. 1974)	12
<i>Cranston v. Hardin</i> , 504 F.2d 566 (2d Cir. 1974)	12
<i>Flouro Electric Corporation v. Branford Associates</i> , 489 F.2d 320 (2d Cir. 1973)	12
<i>L. S. Good & Co. v. H. Doroff & Sons, Inc.</i> , 279 F. Supp. 925 (N.D. W. Va. 1968)	14-15
<i>Oscar Gruss & Son v. Lumbermen's Mutual Casualty Co.</i> , 422 F.2d 1278 (2d Cir. 1970)	12
<i>Hitchcock v. Hunt</i> , 28 Conn. 343 (1859)	14
<i>Neal-Cooper Grain Co. v. Texas Gulf Sulfur Co.</i> , 508 F.2d 283 (7th Cir. 1974)	14
Statutes:	
<i>Conn. Gen. Stat. Ann.</i> (1972) § 37-3A	8
<i>Conn. Gen. Stat. Ann.</i> (1972) § 42a-2-717	9

TABLE OF CONTENTS

iii

Other Authorities:

PAGE

Restatement of the Law in Contracts

Vol. 1, § 336(1), p. 535 (1932) 14

Uniform Commercial Code § 10-4, pp. 323-4 (1972)

James J. White and Robert S. Summers 15

Williston on Contracts, § 1352 (3d ed. 1968) 14

United States Court of Appeals FOR THE SECOND CIRCUIT

PAUL G. GARRITY,

Plaintiff,

and

GARRITY INDUSTRIES, INC.,

*Plaintiff-Appellant,
Cross-Appellee,*

—against—

SOCIETE LES PILES WONDER,

*Defendant-Appellee,
Cross-Appellant,*

and

WONDER CORPORATION OF AMERICA,

Defendant.

ON APPEAL AND CROSS-APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

COMBINED ANSWERING BRIEF AND MAIN BRIEF ON CROSS-APPEAL OF DEFENDANT-APPELLEE, CROSS-APPELLANT

Counter-Statement of the Case with Respect to the Appeal

The characterization of the verdict in favor of Garrity Industries, Inc. ("Garrity") in the amount of \$105,900 as "damages" creates a somewhat inaccurate picture. Ac-

tually the verdict resulted from a compilation of \$65,900 in credits for return of defective lights and \$40,000 in lost profits. The credit portion of the verdict was directed by the Court and was based upon an admission that defective lights had been sold. The credit, whatever the amount, had been available to Garrity as early as September 1, 1972 (A239, 211, 352).^{*} Only the number of defective lights was in dispute (A497). Consequently, the suggestion at page 3 of the Garrity brief that prejudgment interest might have been allowed on the jury award to Garrity is fatuous since, to the extent of the credits allowed, Garrity had never been deprived of any money upon which interest might have been allowed. Garrity never paid for any of the lights. Moreover, it never asked for interest on the profit.

Counter-Statement of the Facts with Respect to the Appeal

In general, the recitation of facts commencing at page 3 of the Garrity brief describes the events leading to the controversy with Societe Les Piles Wonder ("Piles Wonder"). However, a few things may be said to change certain perspectives. The invoices representing deliveries from March 30 through July 3, 1972 were payable by their terms not later than 120 days from the end of the month of each invoice. Consequently, they were payable, respectively, July 30, August 30, and November 20, 1972 (DX-G1 to G10, A577-586).^{**} In all, they represented in French francs the equivalent of more than \$130,000 (A306, 495).

The flashlights incorporating the admittedly defective switch were made at Piles Wonder's plant in France in

^{*} "A" refers to page(s) of the Joint Appendix.

^{**} "DX" and "PX" followed by a number and letter stand for defendant's and plaintiff's exhibits.

May or June 1972 and were included solely in the July deliveries (A309). Since no deliveries were made to Garrity in May or June, none of the flashlights represented in the March and April invoices had a defective switch. Consequently, the impression sought to be created by Garrity that the defect was rampant through the entire 481,000 flashlights has no support whatsoever in the record. The July invoices representing deliveries of 108,000 lights had a value of about \$30,000 (A364-5, DX-G9, G10, A585-6).

Piles Wonder's Answering Argument to Garrity Appeal

POINT I

Payment of the invoices was wrongfully withheld.

The District Court directed the jury to return a verdict in the sum of \$133,446.32, the amount due under the invoices (A495-6). No exception was taken to this by Garrity's counsel (A502).

Moreover, he encouraged it, as follows (A448):

"First of all, there is no question that there are unpaid invoices here and that should be credited over to the defendant. We don't dispute that. We never have. I think his Honor will tell you that the total amount comes to approximately one hundred thirty-six thousand dollars—a few dollars less than that, but I am willing to round it off at one hundred thirty-six thousand dollars. *The issue in this case is: What does Piles Wonder owe to Garrity? That is why we are here.*" (emphasis added)

On a motion to set aside the award of interest pursuant to Rule 59(a) (F.R.Civ.P., the assertion was made in an affidavit of Garrity's counsel that "[A]s of December 1972, when invoices were normally payable, both sides recognized that the deliveries had been defective. . . ." (A251).

In denying the motion directed to the award of interest, the District Court said, among other things (A525-6):

"Because there was no dispute, indeed it was admitted at trial, that plaintiff was indebted to the defendant in the sum of \$133,446.32 for goods sold and delivered to it by defendant prior to any dispute concerning defective flashlights, a directed verdict in that amount was ordered by the Court in favor of the defendant, to which no exception was taken.

"After the verdict was returned on October 18, 1976, we directed the Clerk to enter judgment as to a number of times, including the above amount with interest at six percent (6%) from December 1, 1972, a date much later than the actual date of a large part of the indebtedness. In our discretion we ordered the interest to attach for the damages suffered by defendant by the loss of use of that money. In fact, the defendant's counsel suggested the date of December 1, 1972."

Obviously, the District Court thought payment of the invoices had been wrongfully withheld.

The following factors are among those the District Court had to go on:

1. The deliveries in March 1972 required payment by July 30, 1972 (DX-G1, 2, A577-8). The invoices covering these deliveries totalled about 125,000 francs or \$25,000 (A311). No report of defective lights had been made until almost a month after July 30, that is, on August 25, 1972 (PX-1, A532). Payment was long overdue.

2. The deliveries in April 1972 required payment by August 30, 1972 (DX-G3 to 8, A579-84). The invoices covering these deliveries totalled about 400,000 francs or \$80,000.

3. In his letter of August 25, 1972 (PX-1, A532) in which Garrity reported a "rash of reports" about

defective lights, he did not say anything about withholding payment of the invoices or indicate any such intention. A good reason for this is that Garrity did not anticipate anything other than that Piles Wonder would resolve the defect problem. In the history of the relationship there had been a reject rate of 6% for lights (A59, DX-D, A573) and Garrity had always been accommodated.

4. Shortly after Garrity's letter of August 25, 1972, on September 1st, that is, Mr. Bertin, Export Manager for Piles Wonder, who happened to be in the United States at the time, visited Paul Garrity at Stamford, Connecticut (A311). Mr. Sternlicht, President of Wonder Corporation of America, Piles Wonder's subsidiary, went along with Bertin (A352). Bertin advised Garrity that he was aware that a batch of lights manufactured in May or June 1972 (A309, A352) had the switch defect; that Piles Wonder discovered the cause in August (A308) but did not believe any of the defective batch were included in the July shipment to Garrity until notified by Garrity (A324-4). Bertin told Garrity at the time that Piles Wonder *would give credit* for defective lights (A311, A352). Garrity had no way of knowing how many credits would be required (A76-7).

Consequently, at the time of Bertin's meeting, which was after payment of the invoices for April deliveries was due, Garrity was in a position to receive credit for each defective light that was returned to him whenever it came back.

5. On October 10, 1972, Piles Wonder telexed Garrity that it would allow "true costs" on all defective lights in its inventory (PX-3, A129). Consequently, on October 10, 1972, Garrity was in a position to receive credit for each defective light that was returned to him whenever it came back.

6. The deliveries in July 1972 required payment by November 30, 1972 (DX-G9 to 10, A585-6). The invoices covering these deliveries amounted to about 155,000 francs or \$30,000.

7. On November 27, 1972, Garrity responded to a letter from Piles Wonder admitting that "our Accounting Department is behind in some payments" and further stating as follows (PX-10, A543):

"The Accounting Dept. tells me that they have just asked the bank to buy the French francs to pay invoices #2304, #2357, #2358, #2324 and #2325 which means that we have a total of 7 invoices that are still open with you. *We do not intend to hold up payment on any invoice in lieu of settlement of any claims that we might have regarding the defective merchandise which you readily agreed to reimburse us for our total cost.*" (emphasis added)

In fact, Garrity never paid the invoices Nos. 2357, 2358, 2324, and 2325 (A280). These represented some but not all of the deliveries in March and April (DX-G1 to 4, A577-80). Even these were three to four months overdue.

8. In November 1972, Piles Wonder offered to repair all the lights in Garrity's inventory by a simple procedure that had been used in Europe (A243-4). Mr. Sternlicht advised Garrity of this and arranged for tools to be employed in the work (A353-4, DX-L, PX-8, DX-7, A540, 591). Sternlicht also showed Garrity samples of the repaired lighters (A354). The repair was simply a reinforcing of the switch, and hardly changed the appearance of the light (DX-N, O). Garrity declined the repair offer (A80).

9. On January 5, 1973, Mr. Sternlicht of Wonder Corporation of America advised Mr. Garrity by letter that he had been informed that Piles Wonder's reject rate on flashlights was 6% and that it was prepared to

credit his account with the corresponding percentage applicable to all flashlights beginning with Invoice 2328 (DX-D). This invoice represented lights shipped beginning in April representing deliveries of about \$85,000 even though only about \$30,000 worth of lights, those shipped in July, included the defective batch (A309). Sternlicht's letter also advised that if Garrity were in a position to demonstrate that the actual reject rate was higher, Piles Wonder would issue additional credit as required.

10. In the spring of 1973, the parties, through counsel, participated in discussions in an effort to work out their problems. As a result of those discussions, Piles Wonder offered to Garrity a credit for all the flashlights *defective or otherwise of 1972 manufacture* which remained in the Garrity inventory (A91-2, 106-7, 133, 358-61). This offer was made even though the only flashlights of 1972 manufacture which might have incorporated a defective switch were contained in the July 1972 deliveries and which contained not more than 108,000 flashlights (A309, 364). Moreover, there is no way of telling without operating them how many of these flashlights had defective switches (A92), but it was believed that only a portion of them were traceable to the defective batch of plastic (A241). Pursuant to this agreement, Garrity shipped back for credit at Piles Wonder's expense more than 178,000 flashlights (A142).^{*} A substantial number of the flashlights returned, 83,000 or more, were in unopened cases, some from Garrity's own distributors (A146, 113, 92), and a number in excess of 31,000 were not even of 1972 manufacture (A371-4). Even then, Garrity paid no part of the outstanding invoices.

11. On November 28, 1973, Garrity filed its complaint in this action in the United States District Court,

^{*} At the trial, this figure was raised to 195,000 through additional returns undelivered to Piles Wonder (A142, 143, 147, 449).

demanding a jury trial, based upon six claims for relief, the first four of which involved trademark infringement, and unfair competition, and antitrust violations, and all seeking one million dollars in damages.* The fifth and sixth claims involved breach of warranty in which Garrity sought damages including lost profits totalling the entire amount of all the outstanding invoices. The filing of the complaint represented the first time that Piles Wonder realized that Garrity's claims of breach of warranty would wipe out the entire sum due on the invoices (A3-19).

Section 37-3a of the *Conn. Gen. Stat. Ann.* (1972) provides that interest at the rate of 6% a year may be allowed in civil actions as damages for the detention of money after it becomes payable. It is clear that the District Court regarded the failure to pay the invoices on their due dates as wrongful.

As early as September 1, 1972, Garrity was in a position to obtain credit for all defectives that came back to him whether they were one or thousands. Piles Wonder was not obliged to wait until determination of the total number of defective lights for the payment of its bills. If this were the case, the interest would commence solely on the date the question of the number of defectives was resolved, even though that number might be only *one*. There was always the custom to accommodate Garrity with respect to defectives. The fact that the number of defectives was not immediately known at any time did not absolve Garrity from the payment of those bills. The fact that the number of defectives was not immediately known on September 1, 1972 and other times thereafter when the invoices were payable does not absolve Garrity from the application of the Connecticut statute allowing interest. *Cecio Brothers*,

* These claims, along with certain claims in the counterclaim by Piles Wonder, were dropped by stipulation prior to trial (A3, 20, 41).

Inc. v. Feldman, 161 Conn. 265, 287 A2d 374 (1971). See also *L. Albert & Son v. Armstrong Rubber Company*, 178 F.2d 182 (2d Cir. 1949) wherein interest was awarded on the value of the use of equipment from the time of its use, even though it was later shown the equipment was unacceptable under the contract. Here, Garrity had sold and been paid for more than 300,000 of the lights that were in his inventory as of July 1972 without ever paying Piles Wonder (A105).

In its brief at page 13 Garrity questions the validity of the District Court's holding on the basis of Section 42a-2-717 of the *Conn. Gen. Stat. Ann.*, which provides that a buyer on *notifying* the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract. A requested charge in accordance with this statute was submitted to the District Court but it was refused. The reason is clear. There was never any such notification upon the part of Garrity until long after payment on all invoices was overdue. On the contrary, on November 27, 1972 he advised Piles Wonder that he had no such intention (PX-10, A543).

POINT II

The District Court's exercise of discretion in awarding prejudgment interest was proper.

In his Memorandum Decision, in denying the motion of Garrity to amend the judgment with respect to interest, the Court said the following (A526):

"We got the impression during the trial that the plaintiff's principal officer had a distaste for the payment of money (he was described as a slow paper), but he should offer orisons for the largesse that the jury showered on him or his company, considering the quality of the evidence that was submitted.

"It was our opinion then, and is now, that it is only meet and proper that interest be awarded on such a past due debt to compensate a creditor for the loss of the use of such an amount of money."

It was easy for the Court to conclude that Piles Wonder had been deprived of the use of its money from the beginning not only for the reasons set out in Point I hereof. The Court had the benefit of Mr. Paul Garrity's appearance at the trial. The record is replete with his evasiveness (A111, 124-5, 130-1, 409-10, 413-17). His comptroller, Mr. Chymeryz, in testifying to the loss of a gross profit of 40 cents per light with respect to 83,000 lights held in inventory, stated that if all were sold Garrity would make a net profit of \$6600 but that if none was sold it would lose \$27,600. The inclusion as a loss of the expenses of sale for lights never sold is typical of what the Court referred to as the "quality of the evidence" (A181-3).*

The impression of the Court that Mr. Garrity had a "distaste for the payment of money" derives not only from Mr. Bertin's testimony (A321) but from the entire record. Garrity's advice by letter of November 27, 1972 (PX-10, A543) that he had arranged for the purchase of French francs to pay certain invoices is akin to paying bills with unsigned checks.

In the summer and early fall of 1972, Piles Wonder sold to Garrity a substantial number (in excess of 100,000) of flat batteries which Garrity employed for a new and competitive flashlight of his own make, the Mark IV, which he introduced in September of 1972 as a replacement of the light Garrity had been buying from Piles Wonder (A125, A400, A418). Garrity's distributors began changing their orders in September from the Piles Wonder light to his new Mark IV (A418-19). It turned out that Piles

* If Garrity's net profit on 83,000 lights is \$6600, one wonders how the jury arrived at \$40,000 for profits.

Wonder enabled Garrity by its sale of flat batteries in August of 1972 to launch a product which displaced the Piles Wonder light. One of the explanations why Garrity returned so many lights for credit was that it was retrieving them from its own distributors and was replacing them with the Mark IV (A125). Garrity thus had the advantage of financing the introduction of its new light by withholding payment from Piles Wonder.

The jury gave an award of credit of \$65,900. At 41 cents each, this represented some 160,000 lights. In no way was it possible for that many lights to have defective switches. The only reason the jury could consider a credit on so many lights was because of Piles Wonder's endeavor to get rid of the whole problem by offering credit on all 1972 lights, no matter what their condition. Had Piles Wonder not made this concession, Piles Wonder would have been obliged to prove each and every defective light to get a credit. The fact that Piles Wonder made that accommodation in order to dispose of a problem should not dilute the amount of interest they would have been entitled to. Remember also, that Garrity lumped into the returns over 31,000 lights that had nothing to do with 1972, some of which Garrity might have received back pursuant to a label offer to replace lamps within a year of the date of purchase by payment of \$1.00 (A124, A198-9).

In its discretion, the District Court started interest running from December 1, 1972. He could well have begun interest from the dates the separate invoices were payable, eight of which, involving more than \$100,000, were payable in July and August 1972.

We recognize that the award of prejudgment interest is discretionary under the Connecticut authorities, such as *Bernhard v. Rochester German Insurance Co.*, 79 Conn. 388, 379, 65 A. 134, 138 (1906) and *Bertozi v. McCarthy*, 164 Conn. 463, 466, 323 A.2d 553, 555 (1973), and we be-

lieve the District Court has properly exercised it and that it should not be disturbed. *Cranston v. Hardin*, 504 F.2d 566 (2d Cir. 1974) and *City of Detroit v. Grinnell Corporation*, 495 F.2d 448 (2d Cir. 1974).

Conclusion

The judgment of the District Court awarding prejudgment interest to Piles Wonder should be affirmed. Moreover, the Court should consider whether the appeal is so farfetched and groundless that Garrity is deserving of sanction in the way of counsel fees. Cf. *Oscar Gruss & Son v. Lumbermen's Mutual Casualty Co.*, 422 F.2d 1278 (2d Cir. 1970) and *Flouro Electric Corporation v. Branford Associates*, 489 F.2d 320 (2d Cir. 1973).

MAIN BRIEF ON CROSS-APPEAL

Statement of Issue Presented for Review

On the cross-appeal of Piles Wonder, the following issue is presented: Did the District Court err in excluding from consideration of the jury as an element in mitigation of damages the replacement of defective lights by the Garrity Mark IV light?

Statement of the Case

Piles Wonder has cross-appealed from that part of the final judgment on a jury verdict entered in this action on the 21st day of October 1976 in favor of Garrity in the amount of \$105,900, \$40,000 of which constituted lost profits (A508).

Statement of Facts

It is believed that the facts are sufficiently stated in the briefs of the parties so that no detailed recitation is necessary here.

ARGUMENT ON CROSS APPEAL

POINT I

The District Court erred in excluding from the jury consideration of the Mark IV replacements in mitigation of damages.

The question of lost profits is determined by the Uniform Commercial Code.*

Section 42a-2-712 of the *Connecticut Uniform Commercial Code* reads:

“(1) After a breach within the preceding section the buyer may ‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

“(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller’s breach.

“(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.”

* Both parties treat the statute as applicable since the breaches occurred at the time the lights were used in the United States.

This must be read in connection with Section 42a-2-715 (2)(a) which states:

"Consequential damages resulting from the seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting has reason to know and *which could not reasonably be prevented by cover or otherwise*. . . ." (emphasis added)

Although the term "cover" may appear novel, the concept on which it is based is the age-old maxim of "Mitigation of Damages". This concept is articulated in *Restatement of the Law in Contracts*, Vol. 1 § 336(1) at 535 (1932) as follows:

"Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation."

For over a hundred years, the Courts of Connecticut have uniformly held that where a party has failed to mitigate damages resulting from a contractual breach he cannot recover the damages which could otherwise have been avoided. *Hitchcock v. Hunt*, 28 Conn. 343 (1859). More recently, the District Court in *Beech Aircraft Corp. v. Flexible Turburg Corp.*, 270 F.Supp. 548, 563 (D. Conn. 1967), stated, "The principle of mitigation of damages is an old and honorable maxim of contract law." See *Williston on Contracts*, § 1353 (3d ed. 1968).

Under the Uniform Commercial Code, the rule is clearly that where a party has suffered damages (called "consequential damages" by the Code) which could have been avoided by "cover", these damages are not recoverable. See, e.g., *Neal-Cooper Grain Co. v. Texas Gulf Sulfur Co.*, 508 F.2d 283, 294 (7th Cir. 1974); *Aper Mining Co. v. Chicago Copper & Chemical Co.*, 340 F.2d 985, 987 (8th Cir. 1965); *L. S. Good & Co. v. H. Doroff & Sons, Inc.*, 279

F. Supp. 925, 927 (N.D. W.Va. 1968). ("[T]he buyer is under a *strong* obligation to mitigate his damages."). See also, White, James J. and Summers, Robert S., *Uniform Commercial Code*, § 10-4 at 323-24 (1972).

The District Court properly charged that a person has an obligation to mitigate or lessen his damages in every reasonable way; and that if the jury were persuaded that Garrity could reasonably have prevented loss of profit on defective flashlights by accepting defendant's *offer to repair* such flashlights or by *purchasing new flashlights* for cash, then Garrity would not be entitled to any lost profits (A495).

Piles Wonder had requested the District Court to charge that plaintiff would not be entitled to any lost profits if he could reasonably have prevented such loss by replacement of returned flashlights with Garrity's own new competitive light, the MARK IV. The District Court declined to so charge (A501).

In January of 1973 Garrity issued a sales bulletin with the title, "Old Dispoz-A-Lamp Discontinued" (DX-E, A575a). The bulletin said that because quality of product had deteriorated from its French supplier, he was taking the product off sale. The bulletin went on further to say that the MARK IV light was "the ideal replacement and most distributors have changed their orders." The bulletin further said, among other things, as follows:

"*Most Important*—The Mark IV has the most phenomenal track record *any* flashlight could ever hope to achieve. 'A Complete Sell Out'—within 6 weeks of its introduction. We have, and I know you have been swamped with requests from your accounts to ship Mark IV." (emphasis in text)

As we have indicated before, Piles Wonder showed on the trial that Garrity purchased from Piles Wonder in excess of 100,000 flat batteries to be employed in a new and

competitive flashlight of his own make, the MARK IV. The MARK IV was introduced in September 1972 and from then on, Garrity's distributors began changing orders from the old Piles Wonder flashlight to the new MARK IV.* This is the reason the sales bulletin could say in the first part of 1973 that "it has the most phenomenal track record any flashlight could ever hope to achieve." Later, in the fall of 1972, Piles Wonder learned that Garrity had sought and purchased flat batteries for its MARK IV from one of Piles Wonder's competitors (A312). By December, Piles Wonder realized that the MARK IV was to replace the Piles Wonder light in the Garrity line (A338-9). It appeared, therefore, that the money available for the purchase of batteries for the new MARK IV was provided from the withholding of the outstanding money from Piles Wonder.

The District Court was clearly in error in declining to give the jury the opportunity to decide whether Garrity did or could have mitigated damages by replacement of defective lights with the MARK IV. It appeared that within a short time of its introduction it was the only similar light in the Garrity inventory and was more than replacing any of the sales that might have been made with the Piles Wonder light (A100).

* "By Mr. Foley:

Q. Now, I believe that in the fall of 1972, you began selling a product which is the same as Defendant's Exhibit C, which I hold up; is that correct? A. My product, yes.

Q. Was it true that you replaced the Piles Wonder Dispoz-A-Lamp defective with your own product also? A. I would say there were instances of that because we couldn't get any lamps from Piles Wonder and the customers insisted on a replacement, and we might have sent out some of ours in replacement. I would not deny that we didn't."

By the first part of the year, Garrity was in publication with a disparaging ad on the Piles Wonder light (DX-R, A377-8).

Conclusion

The verdict of the jury for that part of the judgment awarding \$40,000 in profits to Garrity should be reversed and remanded to the District Court for further proceedings.

Respectfully submitted,

PENNIE & EDMONDS
330 Madison Avenue
New York, New York 10017
*Attorneys for Defendant-Appellee,
Cross-Appellant, Societe Les
Piles Wonder*

Of Counsel:

JAMES G. FOLEY
KEITH E. MULLENGER
JOSEPH J. C. RANALLI

(61286)

Two and thirty copies of Two copies
of the within BRIEF is hereby
submitted this 21st day of MARCH 1977

.....
Attorney for PLAINTIFF-APPELLANT,
CROSS APPELLANT

RECEIVED
CASEY, LANE & MITCHELL

...C. M. E...

MAR 31 1977

Received two copies